IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,
Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,
Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York.

BRIEF FOR BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, AND J. LAWRENCE MURRAY, APPELLEES

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BATAVIA TIMES, LAW PRINTERS,
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Statement

This brief is submitted on behalf of the above named appellees. These appellees who were made defendants, with others, in the suit are those directly connected with the State University of New York, a higher educational institu-

tion maintained and operated by the State, and will be separately referred to herein as the "University defendants."

The appellee, Samuel B. Gould, became President of State University of New York on September 1, 1964 (Record p. 69) and was added as an additional party defendant after the suit was instituted (Record p. 18).

The formerly private University of Buffalo merged into the State University of New York as of September 1, 1962 (Record p. 19). The merger was accomplished pursuant to New York Education Law Section 355, subdivision 2, paragraph e. The effect was to make the University of Buffalo thereafter an integral part of the State University of New York, known as the State University of New York at Buffalo, owned and operated by the State. Its faculty and staff became employees of the State of New York subject to state law governing such employees generally and particularly to New York Education Law Section 3022 (the so-called Feinberg Law) which, as amended by Chapter 681 of New York Laws of 1953, had been expressly made applicable to the faculty and staff of institutions of higher education owned and operated by the State or any subdivision thereof.

The academic employees of the State University of New York are in the unclassified service of the civil service of the state (Civil Service Law Section 35, paragraphs (h) and (j)). Thus they are not subject to classification nor to certification by the state Civil Service Commission. The determination of their qualifications and appointment are solely the responsibility of the University itself. In 1953 the Board of Regents had, after notice and hearing, listed the Communist Party of the State of New York and the

Communist Party of the United States of America as subversive in that they advocated the overthrow of government by force, violence or other unlawful means as set forth in Section 105 (formerly Section 12-a) of the Civil Service Law. This raised the presumption provided for in the Regents Rules pursuant to the Feinberg Law that a knowing member of such organizations was ineligible for appointment in the public schools. The Feinberg Law and the presumption so provided for had been held valid by this Court in *Adler* v. *Board of Education,* 342 U. S. 485. Conscious, both of their duties as public officers to comply with the laws of the state and their responsibilities as the governing board of a university, the trustees sought to devise a uniform, university-wide method of making the necessary inquiry which would eliminate uncertainties as to its objective and avoid unwarranted intrusions on personal freedoms (Record pp. 224, 225). This was the procedure for new academic appointments (Record pp. 218-225, 233-260). The prescribed certificate asked only that a prospective appointee recognize that the laws and regulations of the state by which he was to be employed formed part of the terms of his employment and his own statement as to an organizational membership relevant to his eligibility as to which information was made necessary by such laws and regulations.

The certification asked was as to a specific fact about which there could be no misunderstanding. Its particularity was such that no one need guess whether he might honestly so certify. Moreover the information sought by the certificate was not exclusionary. The revelation of party membership could have led only to further inquiry as to whether an applicant or employee was ineligible as a committed advocate of the unlawful overthrow of government.

It is noted here that the New York Court of Appeals in *Thompson* v. *Wallin*, 301 N. Y. 476 (aff'd *sub nom. Adler* v. *Board of Education*, 342 U. S. 485) had already held that the party membership must be with knowledge of the organization's unlawful objective and that the phrase "*prima facie* evidence of disqualification" imported a hearing at which one seeking appointment or retention could present evidence to overcome the presumption. If this were done, the presumption disappears and any finding of ineligibility would have to be sustained by the officer making it in a hearing upon judicial review mandated by subdivision 2 of Section 105 of the Civil Service Law.

When the University of Buffalo was merged into State University it was recognized by the University defendants that they must comply with the law relating to eligibility for employment or retention of the staff and it was sought to do so by use of the established University procedures for that purpose. But there was neither precipitate haste nor were there threats of drastic action. There was patient and extended effort to answer the objections of those who raised them, to explain the statutory requirements and the limitation of the disqualification to those who deliberately advocated that the government "should" be overthrown by unlawful means (See correspondence with various faculty members, Record pp. 263-275 and letter of President Gould to President Furnas, Record pp. 69-73). In particular it was sought to give assurance that the University did not construe the statutory test to be political belief, as distinguished from active advocacy of the unlawful overthrow of government, or to inhibit free intellectual inquiry in the realm of political ideas (Record p. 267).

The appellant Keyishian had a term appointment expiring in August, 1964. He had no tenure beyond the expira-

tion of his term and had been given appropriate notice that his appointment would not be renewed. He was not found ineligible for reappointment but was not reappointed because of his refusal to furnish information relevant to his eligibility.

The appellants Hochfield, Garver and Maud each had term appointments which had not expired at the time President Gould assumed office and when he instructed President Furnas on November 4, 1964, that they should not be prejudiced as to continuance or normal advancements and salary increases pending a disposition of this suit (Record p. 72). This was on the ground that there had been no misrepresentation on their part and they were not presently alleged to advocate violent overthrow of government. Though no stay is in effect, they had raised in good faith the validity of the requirement with which they were asked to comply. The appellant Maud resigned his employment by State University as of September 1965. It would seem that he no longer has standing to appear as a party to the suit.

The appellant Starbuck was not employed in an academic position in the unclassified service and was not asked to sign the certificate prescribed by the University's procedure. His position was in the classified service under temporary certification from the appellee Department of Civil Service. He refused to answer the question on payroll form PR-75 relating to advocacy of the doctrine of unlawful overthrow of government (Record p. 212), and his discontinuance was directed by the Civil Service Commission because of the expiration of the temporary certificate authorizing his employment (Record p. 25).

On May 13, 1965, the University trustees rescinded their former procedures and adopted a resolution setting up a new method for making the determination of eligibility for

appointment to the professional service required by the Feinberg Law. The former requirement for the execution of a certificate by the applicant has been eliminated. The prospective appointee is given a statement prepared by the President of the University explaining the disqualification imposed by Civil Service Section 105 and Education Law Section 3022. The officer making the appointment or the initial recommendation therefor must then make such inquiry as may be needed to satisfy himself as to whether or not such candidate is disqualified under those statutes, as well as to his other qualifications for the position. A personal interview may be required, and refusal to answer any question relevant to the inquiry is sufficient ground to refuse to make the appointment or recommendation.

A further resolution adopted on the same day makes the new procedure applicable to those who have failed to furnish the certificate previously required. It provides that they shall not be deemed disqualified or ineligible, nor subject to charges of misconduct, solely by reason of such failure, if found qualified under the new procedure (Record pp. 276, 277). Manifestly the new procedure does not and could not make the statutes and Regents Rules inapplicable. Pending the disposition of this case no final action has been taken with respect to any of the appellants under the new procedure now in effect, and made applicable to them, for carrying out the duties of the University defendants.

Questions Presented

The brief of the Attorney General takes up the issues sought to be raised by appellants as to the validity of the New York statutes designed to preclude from public employment those who would overthrow the government of the United States or of the State and its political subdivi-

sions by force and violence. The University defendants for whom this brief is submitted rely upon the Attorney General's presentation for the basic validity of the State statutes with which they, in pursuance of their own sworn duty, were bound to comply.

Under Section 3022 of the New York Education Law the Board of Regents have, after notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as subversive organizations, creating a presumption that knowing membership therein disqualified for public employment in the State's public educational institutions. The basis for the disqualification and the presumption, as well, had been contested and sustained by this Court in *Adler* v. *Board of Education*, 342 U. S. 485. These appellees, concerned as a University for academic freedom, sought no foreswearing of beliefs, no promise of future conduct or representation as to past conduct in terms susceptible of misunderstanding, or indeed in any terms. They sought, by the certificate under their former procedure, to elicit only an understanding that academic employees were, like the University itself, bound by State laws and the categorical facts as to an organizational membership which was a presumptive disqualification for employment. Under the new procedure only information relevant to the statutory disqualification may be sought in addition to information relating to personal and professional qualifications for a particular academic position. As to the University defendants, the question is whether it has been shown that they have imposed any requirement or seek any information which is not relevant to a valid condition of eligibility for State employment.

A further question arises because of appellants' demand for monetary relief. Here it is the University defendants'

position that they are not sued for some personal tortious act or personal breach of contract. The gravamen of the allegations against them is that they sought in good faith to carry out the provisions of State laws claimed to be invalid. If there is any liability for monetary damages it is that of the State of New York over which the Federal courts have no jurisdiction in this action. Any such claim can be determined initially only in the Court of Claims of the State of New York.

Summary of Argument

The University defendants have not construed or applied the statutes and rules in issue so as to inhibit personal beliefs or associations not knowingly directed to the overthrow of government by violence or other unlawful means.

They have not applied such statutes and rules to impede the teaching of political and social history and ideas nor to obstruct the expression of any such ideas to be accomplished by peaceful and lawful means.

They have construed the statutory "complex" as requiring a knowing support of the objective that the existing government "should" be overthrown by violence or other than peaceful and lawful means and as creating a rebuttable presumption that Communist Party members are so committed subject to full due process for reviewing any adverse determination.

The State has a proper interest in preventing its public educational facilities, including colleges and universities, from being used to advance such illegal objectives.

The actions of the University defendants complained of were properly limited to obtaining information which they

were required to ascertain and entitled to have in the performance of duties imposed on them by law.

ARGUMENT

The procedures prescribed by the University defendants were and are designed only to enable compliance on their part with State law. The inquiries made are specific and directly relevant to the determination of a valid condition of eligibility for employment by such defendants in the public institutions in their charge subject to procedures fully protecting the rights of those seeking employment.

The State University of New York, while owned and operated by the State and subject to State laws, is an institution of higher learning. The duties of its governing board include the responsibility of administering it so as to further full and free intellectual inquiry which is both the function and the distinguishing mark of any true university (*Sweezey* v. *New Hampshire,* 354 U. S. 234). In that tradition the trustees have been quick to resist attempts to restrict the freedom of the University's students to invite and hear speakers of all shades of political thought, including members of the Communist Party as well as those of the far right. In *Matter of Egan* v. *Moore,* 20 A. D. 2d 150, aff'd 14 N. Y. 2d 775, the trustees supported in the courts their determination that there was no provision of State law forbidding the students to hear an avowed Communist for dispassionate intellectual examination of his doctrine against an attempt to enjoin his appearance. They were successful in sustaining their position that any such external dictation as to the subjects which might be academically considered would be an intolerable limitation on a university.

But personal freedom of belief and academic freedom to teach and to learn do not include freedom to cloak a purpose to bring about the violent overthrow of the very government which supports the university and secures it its freedom, nor to use the opportunities afforded by the university to advance that objective among its students. The basic ineligibility for public employment under the New York statutes is of those who would tear down the government with which they seek employment by other than the peaceful and lawful means open to them under its Constitution and laws. The Feinberg Law expresses special legislative concern about the enforcement of that provision in public educational institutions. *Barenblatt* v. *United States,* 360 U. S. 109, well illustrates the overriding interest of the State, not in controlling what is taught in universities, but in protecting itself against unlawful overthrow. The amendment of the Feinberg Law makes it clear that the Legislature of New York found the interest of the State to be at least equally at stake with respect to public colleges and universities as in the lower levels of the educational system. As held by the court below it would be a dangerous anomoly if the advocacy of violent overthrow (as opposed to the teaching of Communist philosophy) could not be proscribed "in the breeding grounds of the future leaders of the nation" (Record p. 283).

Legislative enactments, even those restricting particular kinds of utterances, are endowed with a presumption that they are necessary and desirable in the dominant public interest derived from the prior legislative determination (*American Communications Assoc.* v. *Douds,* 339 U. S. 382, 401). Here the University defendants dealt not only with a statute presumably valid but one sustained by this Court in *Adler* v. *Board of Education,* 342 U. S. 485. They were

not free to pluck parts from the context of the statutory scheme, as do appellants. It is the particular context which is "all important" (*American Communications Assoc.* v. *Douds,* 339 U. S. 382, 412) and determines whether a statute proceeds on a proper basis and gives fair notice of its requirements. The dominant theme of the New York statute is that public employment is not open to those who knowingly and wilfully advocate that government should be overthrown by other than lawful means. A knowing purpose to advance that objective runs through the statutory "complex" and enters into each of its provisions. The presumption raised by party membership under the Feinberg Law provisions is only that a knowing member supports such illegal objective. It was for this reason that information as to party membership was essential to the determination of eligibility for faculty employment which was the responsibility of the University defendants under laws by which they were bound.

The single actual fact requested by the certificate formerly required avers that the signer is not now a member of the Communist Party and, that if he has been a member he has notified the President of the State University of New York. This statement of fact is neither an oath nor a disclaimer of any vaguely specified conduct or belief. Appellants (other than Starbuck) have refused to sign the certificate and the question before the Court, as it affects such appellants, is the right of the State University of New York to question present and prospective personnel to determine whether they fall within a class made presumptively ineligible for appointment by law.

The essential question is whether the University may ask these specific questions as an initial inquiry to obtain information to determine whether further explanation is neces-

sary to insure that an employee is not ineligible by reason of the valid specific grounds enumerated in Section 105 of the Civil Service Law or *prima facie* disqualified by reason of the valid presumption flowing from Communist Party membership.

This Court has upheld the right of the State and its civil divisions to inquire of employees on matters of loyalty that may prove relevant to their fitness and suitability for the public service (*Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716, *Adler* v. *Board of Education*, 342 U. S. 485).

The Court, in factual situations analogous to this case, has repeatedly expressed the principle that a public employer has a right to pose relevant questions to an employee regarding his associations and activities to elicit information on his past or present advocacy of the overthrow of the government by force, violence or other unlawful means or his organization of, or membership in, any group which advocates the violent overthrow of government. This principle applies not only to applicants for potential employment but to all employees regardless of their length of service. The cases base disqualification or dismissal on the ground that a public employee or applicant for public employment has an obligation to his present or potential employer to provide a minimal standard of candor and frankness in answering questions concerning knowing associations or activities, whether past or present, which reflect on his fitness and suitability for public employment. Of course, the individual has the right and privilege to remain silent but cannot thereby obtain or retain employment in the publice service. These cases base disqualification or removal solely on the failure to answer a relevant question which thus impedes a proper inquiry process and are not based

upon the invocation of the privilege against self-incrimination or inferences from the failure to answer specific questions as evidence or proof of any specific fact (*Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *Re Anastalpo*, 366 U. S. 82).

Further in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, this Court, while declaring a particular Florida Oath as constitutionally defective, stated:

> "Nor do we question the power of a State to safeguard the public service from disloyalty. *Cf. Slowocher* v. *Board of Higher Education*, 350 U. S. 551, 100 L. ed. 692, 76 S. Ct. 637; *Adler* v. *Board of Education*, 342 U. S. 485, 96 L. ed. 517, 72 S. Ct. 380, 27 ALR 2 D. 472" (P. 287).

In *Baggett* v. *Bullitt*, 377 U. S. 360, 12 L. ed. 2nd 377 (1964) which referred to *Cramp*, this Court said:

> "As in *Cramp* v. *Board of Public Instruction, supra*, we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct" (P. 390).

Thus, the *Cramp* and *Baggett* cases have reaffirmed the principle that the government has a right to make inquiry of employees and prospective employees in the public service to ascertain that they do not advocate the doctrine of the overthrow of the government by force and violence nor are they knowing members of organizations which so advocate such doctrine.

The certificate heretofore required by the State University asked only for a statement of a categorical fact relevant to determination of a valid qualification for employment fixed by law. That fact was whether a person is or

has been a member of the Communist Party. There can be no doubt as to what was asked. No one need guess at his peril whether he may honestly so certify one way or the other. No one risked foreswearing his individual right of free expression of his views or peaceful action to bring about change. Indeed the revelation of present Party membership would be only presumptive evidence of disqualification and if found ineligible the statute itself provides for a full judicial hearing, in addition to any University hearing to which an employee's tenure might entitle him (New York Civil Service Law Section 105[2]). The communication of past Party membership to the President enables a determination by him on further inquiry as to whether it has been terminated in good faith, subject to the same right of hearing, if found ineligible. But refusal to furnish specific information sought by the University in order to comply with the laws by which it is governed can only be deemed to be insubordinate defiance of its requirements.

It may be added that the further provision of the certificate, that an applicant or employee state that the law and rules are a part of the terms of his employment, can be no more vague or uncertain as to what is being acknowledged than the law or rules themselves. If they are valid, as has been held, they would enter into the terms of employment in any event. It cannot be a proper ground of complaint that they are specifically brought to an employee's attention. Nor can there be any invalid vagueness in asking recognition of the objective requirements of the New York law. Every man can know with certainty whether he advocates the doctrine that the government should be forcefully overthrown or whether he is a member of the Communist Party, which creates a valid presumption of such advocacy. If he does advocate such doctrine no view of constitutional

right yet expressed says that he may not be disqualified for public employment. Since such a measure of eligibility is constitutionally permissable, there can be no violation of rights because a public employer seeks relevant information and no right to employment in the face of wilful refusal to furnish it.

It is possible the appellants feel that the State University of New York has no right to ask any questions concerning their political-social affiliations or activities. Carried to its logical context in this pertinent background there would then be no incompatibility with fitness and loyalty for a Communist Party member presumptively committed to violent overthrow of government to teach in a public institution in this state. To pose the question and answer in the affirmative would be a paradox. If his party membership is innocent, the Civil Service Law itself preserves a full right of *de novo* judicial hearing on that issue. But to refuse the information, given the validity of the statute, is to demand the right of appointment while at the same time asserting a right to withhold relevant information about a pertinent qualification.

The allegation of vagueness because of the complexity of statutes, regulations and rules is denied by defendants. Actually the publication of the University of the State of New York mentioned on the face of the Trustees' Certificate, entitled "Regents Rules on Subversive Activities", correlates in a booklet the various provisions of statutes, regulations and rules. The writing is organized, clear and unaffected. The rules and regulations trace their statutory authority and outline the due process procedural requirements in an adequate fashion. There is no more complexity in this pamphlet than the subject matter warrants.

Given the right to make the inquiry, it cannot be said that the form in which the University has previously done so by certificate is burdensome, unnecessary, or unreasonable. It relied upon direct inquiry to the one best positioned with the facts. It hoped for an honest reply that may not in fact be given. But surely the propensity of those who would destroy the government by force to misrepresent does not cast the right to inquire in constitutional doubt. Nor can direct inquiry of an applicant be any less admissible than inquiry from other sources as to a fact which bears on his qualifications. Indeed direct inquiry is the usual way of establishing employment qualifications.

Appellants' attempt to expand the University's certificate into an interference with their academic freedom and right of political expression is a perverse refusal to recognize the limited and categorical nature of the inquiry made and its clear relation to the kind of loyalty which the State may constitutionally require of those who seek to enter its service.

By their refusal appellants obstructed the University's efforts to determine in good faith whether they met qualifications fixed by statutes binding on the University. Should their answers, if given, have revealed past, but not present, Party membership, the President had opportunity under the procedure to determine whether it has been terminated in good faith. Should present membership have been established the statute itself (New York Civil Service Law Section 105(2)) provides for full judicial hearing in which the presumption of disqualification may be overcome. If appellants are not, and never have been, Party members no presumption of disqualification arises. But refusal to answer frustrates the University's duty and prevents determination of the appellants' rights as affected by their an-

swers in accordance with the due process provided by New York law. Even their refusal to answer cannot result in summary dismissal as to those presently having term or tenure appointments under the University's own policies. These could only be dismissed on charges after hearing before a University faculty committee known as the Standing Committee on Terminations.

In fine, if Communist Party membership may be made a relevant consideration upon qualification for employment under the New York statutes, which have been held valid and as to which we refer the Court to the brief of the Attorney General herewith, then these defendants submit that there can be no merit to any objection here posed to the manner in which they have previously sought to inquire into and determine that qualification, subject to all the safeguards of the New York law.

It concedes no question of the validity of the former procedure that the University has now changed it to eliminate the signing of a certificate which aroused the opposition of the academic world. That opposition has been directed both at the policy and legality of so called "loyalty" inquiries. It often proceeds by imputing to disqualifications imposed by law or regulation a far broader reach and purpose than a fair reading will sustain. Upon such fallacious premises the argument of interference with academic freedom and constitutionally protected rights is built.

In this case it is sought to stretch a test of fitness for public employment directed against deliberate teaching that government "should" be destroyed by violence or other unlawful means into an interference with teaching about history or social, economic and political issues against which it was never aimed. The new procedure of the University no longer requires a certificate by an appointee.

It still requires inquiry to be made by appointing officers for the University cannot alter the eligibility requirements fixed by the Legislature.

The new procedure provides for a statement explaining the law and presumptive disqualification of Communist Party membership so that prospective appointees will be fully informed of the conditions under which they may properly accept appointment. It provides opportunity for the applicant to request an interview at which any matter relevant to his qualifications may be fully and fairly discussed with the appointing officer, including any matter in rebuttal of a presumptive disqualification. It provides also that the appointing officer may require an interview at which he may resolve any doubts he may have by direct inquiry and where the applicant can have the opportunity to be heard upon any relevant matter. There must still be an ultimate determination that the applicant does not deliberately advocate that the government "should" be overthrown by violent or unlawful means. Should he be held ineligible on any such ground we stress again that the Civil Service Law itself entitles him to a *de novo* judicial hearing with the burden on the University. But no man may be held ineligible for advocating changes in laws or governmental policies, however unpopular, by the means lawfully open in our free society so long as it remains free. The University seeks only to determine, as it must, in which category fall those who seek to serve it in its educational mission.

CONCLUSION

The judgment of the Court below should be, in all respects, affirmed.

October 27, 1966.

Respectfully submitted,

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